

California Secretary of State

Proposed Regulatory Action: Election Observations Rights and Responsibilities Initial Statement of Reasons

PUBLIC HEARING AND COMMENT

Hearing Date: No hearing date is scheduled. A public hearing will be held if any interested person, or his or her duly authorized representative, submits a written request for a public hearing to the contact person listed no later than 5:00 PM, on August 29, 2022.

Written Public Comment Period: July 29, 2022, through September 12, 2022.

Subject Matter of Proposed Regulations: Election Observations Rights and Responsibilities.

Section(s) Affected: Sections 20871 through 20878 of Title 2, Division 7, Chapter 8.2 of the California Code of Regulations.

PURPOSE AND NECESSITY

Groups and individuals (“election observers”) observe the conduct of various aspects of many California Elections. There are some references to election observation in the Elections Code, but those references are not sufficient to clearly set forth the rights and responsibilities of the election observers and the county elections officials. These regulations are being proposed to close that gap and provide uniform guidance to election observers and county elections officials for the observation process. It is anticipated that having clear guidance with respect to the observation process - in the form of these regulations - will aid elections officials in addressing tense situations with election observers that have appeared more frequently in the past few elections.

These regulations are necessary to ensure uniform observation of elections in California. With these regulations, observers will know up front what their rights are, regardless of the jurisdiction where they are observing an election. They can point to these regulations to ensure they have appropriate access to observing election activities. Similarly, county elections officials will be clear on how elections observers fit into the election administration process. These regulations balance the rights and needs of elections observers with county elections officials’ need to efficiently and accurately complete elections activities.

During the development of these regulations, the Secretary of State’s office worked with county elections officials and several voting advocacy groups to ensure that there is agreement with the need and content of these regulations.

FACTUAL BASIS / RATIONALE

The Secretary of State has developed a portion of these regulations with a subcommittee of

The purposes of these regulations are to:

1. Establish guidelines and procedures for elections officials and election observers.
2. Establish the rights of election observers.
3. Establish rights of county elections officials with respect to the elections observation process.
4. Provide clear duties for election observers.
5. Provide clear duties for county elections officials with respect to the elections observation process.
6. Establish guidelines for the conduct of election observers.
7. Provide clear guidance with respect to voter challenges.

The factual basis and rationale for each section of the proposed regulations are as follows:

20871. General Provisions.

This proposed section sets forth the purpose of the regulations and who the regulations apply to. This section is nonsubstantive.

20872. Definitions.

This proposed section provides definitions for the terms used throughout the proposed regulations.

Subdivision (a) defines the term “bona fide association of citizens.” This definition is necessary to clarify what is deemed a bona fide association of citizens for the purposes of this chapter.

Subdivision (b) defines the term “central counting site.” This definition is necessary to clarify what constitutes a central counting site for the purposes of this chapter.

Subdivision (c) defines the term “election observer.” This definition is necessary to clarify who is an election observer for the purposes of this chapter.

Subdivision (d) defines the term “Election Observer Panel.” This definition is necessary to clarify what an election observer panel is for the purposes of this chapter.

Subdivision (e) defines the term “elections official.” This definition is necessary to clarify who is deemed an elections official for the purposes of this chapter. This term is partially defined by Elections Code section 320, but for the purposes of this chapter, the definition has been expanded to include different types of people who work with the county elections official during the conduct of an election.

Subdivision (f) defines the term “observe.” This definition is necessary to clarify what the term observe means for the purposes of this chapter.

Subdivision (g) defines the term “polling place.” This definition is necessary to clarify what locations are deemed a polling place for the purposes of this chapter. Although Elections Code section 338.5 includes a vote center as a polling place, the additional language regarding a vote center has been added for clarity and to ensure that it is known that a vote center is in fact considered a polling place. In addition, this definition has been expanded beyond Elections Code section 338.5 to include satellite locations, as elections activity can occur at those locations.

Subdivision (h) defines the term “precinct board.” This definition is necessary to clarify what a precinct board is for the purposes of this chapter.

Subdivision (i) defines the term “precinct.” This definition is necessary to clarify what a precinct is for the purposes of this chapter.

Subdivision (j) defines the term “sufficiently close.” This definition is necessary to clarify what “sufficiently close” means for observing the processing of vote-by-mail ballots and vote-by-mail ballot identification envelopes.

Subdivision (k) defines the term “vote-by-mail ballot processing.” This definition is necessary to describe what vote-by-mail processing consists of for the purposes of this chapter.

Subdivision (l) defines the term “voting equipment.” This definition is necessary to clarify what voting equipment consists of for the purposes of this chapter. For clarity, there are additional terms recited from the Elections Code, all of which encompass voting equipment.

Subdivision (m) defines the term “voter list.” This definition is necessary to clarify what the term voter list means for the purposes of this chapter.

20873. Rights of Election Observers.

The purpose of this section is to explicitly details what rights election observers have. This section is necessary to protect the observers' rights to observe the elections process.

Subsection (a) provides a recitation of Elections Code section 15004 regarding the observation of the pre-election activity of preparing vote tabulation devices. This recitation is necessary to provide clarity to the individuals and groups who wish to observe that activity, and to elections officials who must allow the observation to occur.

Subsection (b) provides a recitation of Elections Code section 15104, which allows observers to observe the processing of vote-by-mail identification envelopes and vote-by-mail ballots. This recitation is necessary to provide clarity to the individuals who wish to observe that process, and to elections officials who must allow the observation to occur.

In addition, this subsection identifies a list of that constitute the processing of vote-by-mail identification envelopes and vote-by-mail ballots. Sections (A) through (I) have been included in the proposed regulations to make it clear what the process consists of, and to make it clear that these tasks may be observed by an observer.

Subsection (c) provides a recitation of Elections Code section 15105. This recitation is necessary to make it clear to elections officials that observers do have a right to make challenges during the time vote-by-mail identification envelopes and vote-by-mail ballots are being processed.

Subsection (d) is necessary to make it clear that an observer is to have the ability to observe polling place activities not just while the polling place is open, but also during the times when the polling place is being set up and also when the polling place is being closed.

Subsection (e) provides a recitation of Elections Code sections 14223 and 14294. These sections provide that an observer may inspect the contents of the voter list that is posted or is otherwise available. The recitation of these sections is necessary to provide clarity to the individuals who wish to inspect the voter list, and to elections officials who must allow that inspection to occur.

Subsection (f) is necessary to make it clear to observers and elections officials that observers may be present to observe election-related activities at a central counting site on Election Day.

Subsection (g) provides that an election observer shall be permitted to observe the official canvass and/or the semiofficial canvass of the election. This section includes references to Elections Code sections 333.5 and 335.5, which define official canvass and semiofficial canvass. This section is necessary to make it clear to observers and elections officials that observers may be present during the canvass. The Elections Code references are necessary to provide clarity to observers as to what constitutes the official canvass and what constitutes the semiofficial canvass.

Subsection (h) provides that an observer has the right to ask questions of poll workers while observing. However, any questions must not interfere with the conduct of any part of the voting process, and, if that occurs, the precinct board has the authority to discontinue responding to questions. This section is necessary to clarify that observers may ask questions, and poll workers must respond, but those questions cannot interfere with the conduct of the election.

Subsection (i) provides that an observer has the right to ask questions of polling place supervisors while observing. However, any questions must not disrupt the execution of the required duties of the supervisor, and, if that occurs, the supervisor has the authority to discontinue responding to questions. This section is necessary to clarify that observers may pose questions to polling place supervisors, and those supervisors must respond, but those questions cannot interfere with the conduct the supervisor's required duties.

Subsection (j) provides that the elections official may designate a person to answer questions from observers. If such a person has not been designated, or if the person is not present, the observer may pose questions to any members of the precinct board. The purpose of this section is to provide elections officials with the ability to have one person answer questions so as to limit interference or disruption in the conduct of the election. Having one person as the designated question receiver makes it easier for observers and the other members of the precinct board because the observer will know who to talk to, and the other members of the precinct board can continue their duties without interruption.

Subsection (k) provides that an observer may use an electronic device while observing at a polling place or central counting site. This section provides a recitation of Elections Code section 2302, which is necessary to clarify for observers and elections officials that electronic devices may, under most circumstances, be used while observing. The use of the electronic device, however, must not interfere with the conduct of the election, and that use must be in accordance with the provisions of Section 20786(b).

Subsection (l) provides that an international observer shall have the same rights and responsibilities as any other observer. This is a recitation of Elections Code section 2301 and is necessary to clarify that all observers shall be treated in the same manner, and all have the same rights and responsibilities with respect to observation.

20874. Rights of County Elections Officials.

The purpose of this section is to explicitly detail what rights county elections officials have. This section is necessary to allow the county elections officials to restrict access to certain areas and to ensure that the entire elections process is conducted in a safe, secure, transparent, and efficient manner while allowing observers to be a part of the process.

Subsection (a) provides guidance to elections officials for determining how they can best accommodate observers based upon their particular circumstances. Each of California's 58 county elections officials have different levels of staff, workspace, and other resources. This

subsection is necessary to provide specific criteria for elections officials to use for determining the distance at which an observer may observe any election process and/or activity. This subsection provides clarity to observers by detailing what criteria is used by the elections official when the observation area(s) are created. While this section provides discretion to the elections official, this discretion must be exercised in a manner that maintains the right for observers to observe the elections process.

Because each county elections official has differing numbers of staff, size of locations, and different access to resources, subdivisions (1) through (8) provide specific criteria that elections are to consider when determining observation space that will accommodate observers, and not interfere with the conduct of the election. This is not intended to be an exhaustive list but is intended to provide a minimum set of considerations for elections officials.

Subsection (b) requires that an election observer is to wear readily identifiable identification while observing. This provision is necessary so elections officials and voters know that a particular person is an observer. This helps elections officials keep the location where observation is occurring safe and secure, and also helps voters because they will know that the person officially observing, and not just loitering (which could intimidate a voter).

Subsection (c) provides county elections officials with the authority to designate a person to whom an election observer can ask questions and/or present a challenge during the observation process. The purpose of this section is to provide elections officials with the ability to have one person answer questions so as to limit interference or disruption in the conduct of the election. Having one person as the designated question receiver makes it easier for observers and the other members of the precinct board because the observer will know who to talk to, and the other members of the precinct board can continue their duties without interruption.

Subsection (d) provides that the elections official may designate a person to whom an observer may present a challenge during the processing of vote-by-mail ballots and identification envelopes. The purpose of this section is to provide elections officials with the ability to have one person receive challenges so as to limit interference or disruption in the conduct of the election. Having one person as the designated receiver of a challenge makes it easier for observers and the individuals processing the ballots and envelopes because the observer will know who to talk to, and the processing can continue without interruption.

Subsection (e) provides county elections officials with the authority to require an election observer to remain quiet inside the observation area, unless the observer is asking a question to the person designated to respond to questions. This provision is necessary to limit the noise in the area where an elections process or activity is taking place. Any additional noise can distract elections officials who are performing sensitive tasks and could interfere with the conduct of the elections process or activity.

Subsection (f) provides county elections officials with the authority to warn an observer that they are not following observation rules, and also to remove the observer if the observer continues to

fail to follow the observation rules. If an observer is not following established rules, they are likely disrupting the elections process or activity, which cannot occur. Any such occurrence can interfere with the conduct of the elections process or activity.

Subsection (g) allows the county elections official to restrict the number of persons in a particular observation area. Each observation area consists of different available space, and if too many observers are present, that could interfere with the conduct of the elections process or activity. This provision is necessary so that observers are aware that they may be denied access to a particular area because of possible interference with the elections process or activity.

Subsection (h) allows the county elections official to restrict items that an observer may wish to bring to the polling place or central counting site. This provision is necessary to ensure that observers are not carrying or storing large items that may get in the way of voters or election workers. These items could interfere with the conduct of the elections process.

Subsection (i) allows the elections official to develop and provide additional written rules and procedures that may be specific to their county. As all counties differ in many ways, this proposed section is intended to provide elections officials with flexibility to create written rules and procedures that may only apply to that county. While this provision allows additional procedures beyond what is provided for in this Chapter, any additional procedures must be consistent with the intent of this Chapter and the California Elections Code. This provision is not intended to allow elections officials to create additional procedures to limit the rights of observers.

20875. Duties of Election Observers.

The purpose of this section is to detail the actions required by observers when observing an elections process.

Subsection (a) requires an observer to check in at a designated site upon arrival at the location where observation is taking place. This provision is necessary so elections officials and voters know that a particular person is an observer. This helps elections officials keep the location where observation is occurring safe and secure, and also helps voters because they will know that the person officially observing, and not just loitering (which could intimidate a voter).

Subsection (b) requires that an observer wear identification at all times. The identification is likely provided by the elections official, but if the observer has their own identification, that identification shall not include any electioneering information or information that would intimidate a voter. This provision is necessary so elections officials and voters know that a particular person is an observer. This helps elections officials keep the location where observation is occurring safe and secure, and also helps voters because they will know that the person officially observing, and not just loitering (which could intimidate a voter). This subsection also ensures that an observer who wears their own identification is not advocating for

a person or measure on the ballot or is not displaying anything that would lead to a voter being intimidated.

Subsection (c) provides that an observer must not disrupt the voting process and must follow any established observation rules and procedures. This subsection is necessary to ensure that observers are aware of what is expected of them, and also helps the elections official ensure that the election process is not being disrupted in any manner.

20876. Duties of County Election Officials.

The purpose of this section is to detail actions required by elections official to ensure that observation is available to all those who wish to observe in a transparent manner.

Subsection (a) requires the elections official to make available any and all written rules for the observation process as well as for the elections process being observed. These materials must be provided, offered, or posted to ensure that observers have access to them. This provision is necessary to ensure that observers are aware of any observation rules, and also can be made aware of any procedures in place for the process being observed. This provision is necessary to ensure transparency in the elections process.

Subsection (b) requires the elections official to establish security rules for observation. These security rules must be consistent with the intent of this Chapter and any applicable provision of the Elections Code. This provision provides examples of items and actions that may be necessary to ensure that the integrity of the elections process is maintained.

Subsection (c) provides the elections official with the discretion to determine what constitutes observer misconduct or interference with the elections process. This provision is not intended to allow the elections official to limit the right to observe an elections process, but is intended to ensure that the elections process is not disrupted whatsoever. The elections official is in the best position to determine if the activity of an observer is deemed disruptive to the elections process. Maintaining the integrity of the elections process is vital

Subsection (d) provides that the elections official is to provide certain notices to the public for certain activities. While these required notices are contained in the Elections Code, the inclusion of those notices in the proposed regulations are necessary for clarity to the observers and the elections officials. In addition, this provision requires that the notices include the specific dates and times of the applicable activity so observers are fully informed as to when those activities are to take place.

Subsection (e) requires the elections official to have a designated area for observers to check in and receive identification (if applicable). This provision is necessary to ensure that there is an obvious location for an observer to go to when they arrive to observe. Having a designated place will ensure efficiency and reduce any confusion about where the observer is to go upon arrival.

Subsection (f) provides that the elections official is not required to delay or interrupt a scheduled activity because of the presence or lack of presence of an observer. This proposed section is not intended to allow an elections official to modify a schedule so an observer cannot be present but is intended to make it clear that a scheduled activity will take place whether or not an observer is present. For example, if vote-by-mail ballots are to be processed at 8:00 a.m., but an observer notifies the elections official that they will not arrive until 9:00 a.m., the elections official does not need to wait until 9:00 a.m. for the observer to arrive.

Subsection (g) provides a requirement that county elections officials to develop and submit an election observation plan no later 60 calendar days prior to a statewide election. The purpose of this plan is to outline observation processes and protocols, which must be made available to the public on the elections official's website and/or in person at the elections official's office. The plans are intended to encourage participation in the elections process and increase transparency in the elections process.

Subdivision (1) details what information the county elections official is to provide for the election observation plan. The required information includes the contact information for the county, and the voting technology used in the county.

In addition, the county must provide any existing observation rules and procedures for observers and elections officials, which include but are not limited to, a list of observable activities, check-in procedures for observers, a general description of the county's security procedures, details on designated observation areas, and a designated point of contact.

The county must also include the planned implementation date of their election observer plan, a list of panel members (if applicable), and established methods for panel members to provide feedback (if applicable).

Under subdivision (2), in order to create the county's election observer panel, the county shall invite the county grand jury, the political party central committees in the county, and any known group or individual who may wish to participate as part of the panel.

Subdivision (3) requires that the invitations to those individuals and entities described in subdivision (2) between 90 and 30 days prior to the date of the next election. This provides sufficient time for the panel to be developed prior to the election.

In the event an individual and/or an entity accepts the invitation to be part of the observer panel, the elections official is to provide that person and/or entity with an appointment letter and introduce them to precinct workers. The introduction to the precinct workers allows them to be aware of who the panel members are so there is no confusion as to who may be visiting and observing at a polling location. The panelists will be provided materials detailing their locations and duties and are also provided an opportunity to provide feedback on the panel and their experiences while observing.

20877. Conduct of Election Observers.

The purpose of subdivision (a) is to introduce the subsequent subsections that detail actions that an election observer shall not do, so as to minimize distraction or disruption of the elections process.

Subsection (1) prohibits an election observer from interfering with the conduct of an election, and also prohibits an observer from physically handling any voting materials without permission. This section is necessary because an observer must know that they cannot interfere with the conduct of the election.

Subsection (2) prohibits an election observer from physically handling any voting equipment. This section is necessary because an observer must be made aware that they may not touch any voting equipment, as that touching could interfere with the conduct of the election and/or the results of the election.

Subsection (3) prohibits an election observer from moving certain items without the express permission of the elections official. This section is necessary because the elections official sets up areas in a certain fashion for efficiency, safety, and security. Moving any of these items could cause a disruption or interference with the conduct of the election.

Subsection (4) prohibits an election observer from sitting at the worktables of an elections official and from viewing confidential voter information. This section is necessary to ensure that the workspace of an elections official is not disturbed, and to prevent any confusion about the observer being an elections official. In addition, only elections officials can view confidential voter information during a particular elections process, and at no time shall an observer view or attempt to view that confidential information. Doing such could undermine the confidence of the election.

Subsection (5) prohibits an observer from engaging in any electioneering activities. While electioneering is a defined term with an accompanying penal provision, the recitation of the prohibition found in the Elections Code is necessary here for clarity to observers and elections officials who must monitor such activity.

Subsection (6) prohibits an observer from displaying any political party or campaign material while observing. Wearing such material could influence a voter, make a voter feel uncomfortable, or intimidate a voter if they do not agree with the material being displayed. The elections process should be free from distractions and partisan displays.

Subsection (7) prohibits an observer from soliciting a vote, speaking to a voter, or communicate to a voter about their qualifications within 100 feet of the locations identified in Elections Code section 319.5. At these locations, voters are casting ballots, and must be free from distraction and influence. This section provides a reference to Elections Code section 319.5, which is necessary to clearly define where the prohibited activity cannot occur.

However, there are two exceptions to this provision. First, exit polling may occur if it is at least 25 feet away from the identified locations. Second if a voter has asked for assistance, then that person is not in violation of this provision if they are speaking with the voter.

Subsection (8) prohibits an observer from wearing the uniform of a peace officer, a private guard, or security personnel. Doing such could intimidate a voter and could dissuade them from casting a ballot at that polling location. It can also provide confusion to a voter who may think the person in uniform is an employee of the elections official and is there in an official capacity. Intimidation must not occur at a polling place or any other place where an elections process is occurring.

Subsection (9) prohibits an observer from stopping or attempting to stop workers from processing voted ballots. This provision is necessary to ensure that there are no interruptions or delays when ballots are being counted. This provision is not intended to prevent an observer from asking a question or presenting an allowed challenge to a designated person or other elections official but is intended to prevent an observer from halting the counting process.

Subsection (10) prohibits an elections observer from utilizing certain equipment without the express permission of the elections official. Anyone other than an elections official who uses elections equipment could interfere with or disrupt the conduct of the election, which could put the election itself in jeopardy. Only those authorized to use such equipment should do so to prevent any unintended interference with the elections process.

Subsection (11) prohibits an observer from eating or drinking in a polling place or a central counting site without prior permission from the elections official. Eating or drinking in these areas can disrupt the elections process if something is spilled, if packaging is noisy, or has an odor that may bother or disturb voters and/or election workers. These areas must be free from outside distractions and interference.

Subsection (12) prohibits observers from assisting in any operations at a polling place or a central counting site without prior permission from the elections official. This provision is necessary because an observer who attempts to assist in an elections activity could be injured, could disrupt the elections process, or could intentionally destroy or alter ballots and/or voting equipment. This must be avoided at all costs.

Subsection (13) prohibits an observer from intentionally preventing another observer from observing a particular process. This provision is necessary because observers have the same right to observe a particular process, and interfering with that right is not acceptable.

Subsection (14) prohibits an observer from entering a secure area without the prior permission from the elections official. If an observer is allowed to enter a secure area at will, the observer could be injured, could disrupt the elections process, or could intentionally destroy or alter ballots and/or voting equipment. This must be avoided at all costs.

Subsection (15) Enter any area other than an identified observation area without the express permission of the elections official. If an observer is allowed to enter any other area not identified as an observation area, the observer could be injured, could disrupt the elections process, or could intentionally destroy or alter ballots and/or voting equipment. This must be avoided at all costs.

Subdivision (b) provides that an election official shall refrain from touching an elections official. While inadvertent touching can occur when moving around an area where observation is occurring, this section is intended to make it clear that an observer is not allowed to touch an elections official in a threatening, aggressive, or unwanted manner.

20878. Voter Challenges.

This section is necessary to make it clear that an election observer does not have the right to challenge the qualifications of a voter. This section is intended to help both an observer who may wish to challenge a voter's qualifications, and to the elections official who can utilize this section in the event such a challenge from an observer occurs.

Subdivision (a) provides that only a member of the precinct board may challenge a voter's right to vote. While this subdivision provides a partial recitation of and reference to Elections Code section 14240, this is necessary to provide clarity to observers and elections officials.

Subdivision (b) again states that an observer may not directly challenge a voter, but adds an exception found in Elections Code section 14240(c). Section 14240(c) allows a person to provide written evidence concerning a voter's qualifications to a member of the precinct board, who has the authority to review said evidence and possibly challenge the voter. While this subdivision provides a partial recitation of and reference to Elections Code section 14240(c), this is necessary to provide clarity to observers and elections officials.

ECONOMIC IMPACT STATEMENT

These regulations have been established to provide clear guidance to elections observers and to county elections officials relating to the observation of elections in California. There is currently very little information on the rights and responsibilities for elections observers and county elections officials.

These regulations relate to activities that currently occur during every election, and do not create any costs to observers or elections officials, so no fiscal impact exists.

Creation or Elimination of Jobs within the State of California

It is not anticipated that these regulations will create or eliminate jobs within the State of California. These regulations relate to existing activities carried out by observers and elections officials. Therefore, no additional staff should be required for groups who observe or county elections officials.

Creation of New or Elimination of Existing Businesses within the State of California

These regulations are anticipated only to affect individuals and groups who observe elections processes and local elections offices. These regulations related to existing activities carried out by observers and elections officials. They should not create or eliminate a new industry or related businesses within the State of California.

Expansion of Businesses or Elimination of Existing Businesses within the State of California

These regulations are anticipated only to affect individuals and groups who observe elections processes and local elections offices. These regulations related to existing activities carried out by observers and elections officials. They should not expand or eliminate a new industry or related businesses within the State of California.

Benefits of the Regulations

The benefit of these proposed regulations is that they will ensure uniform observation of elections in California. With these regulations, observers will know up front what their rights are, regardless of the jurisdiction where they are observing an election. They can point to these regulations to ensure they have appropriate access to observing election activities. Similarly, county elections officials will be clear on how elections observers fit into the election administration process. These regulations balance the rights and needs of elections observers with county elections officials' need to efficiently and accurately complete elections activities.

In addition, these proposed regulations will increase transparency in the elections process, which will strengthen the public trust in the State of California's election process.